

Commercial Testing & Engineering Co. and United Steelworkers of America, AFL-CIO. Case 8-CA-14139

July 9, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On November 30, 1981, Administrative Law Judge David L. Evans issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order, as modified herein.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Commercial Testing & Engineering Co., Ashtabula and Conneaut, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete from paragraph 1(a) the words "threatening more arduous working conditions."

2. Substitute the following for paragraph 2(a):

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91-NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² We hereby correct the Administrative Law Judge's inadvertent error in finding that Respondent violated Sec. 8(a)(1) of the Act by threatening employees with more arduous working conditions if the Union won the election. Although the Administrative Law Judge found this violation in his Conclusions of Law, Order, and notice, it is clear from the body of his Decision that the remarks in question were made in a private conversation between two supervisors which was not overheard by employees and that the Administrative Law Judge considered this testimony only for the purpose of demonstrating union animus and not as a violation of the Act. Accordingly, we amend the Administrative Law Judge's Conclusions of Law by deleting the phrase "threatening more arduous working conditions" from par. 3. We shall also modify the Order and notice accordingly.

³ Member Jenkins would compute interest in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

"(a) Offer David Anderson immediate and full reinstatement to his former position of employment or, if such position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of his discharge in the manner set forth in the remedy section of this Decision."

3. Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the July 7, 1980, discharge of David Anderson and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."

4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT solicit grievances from employees, make promises of benefits to employees, interrogate employees, or threaten employees with discharge in order to discourage them from joining or supporting United Steelworkers of America, AFL-CIO, or any other labor organization.

WE WILL NOT discharge employees because they engaged in activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer David Anderson immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make David Anderson whole, with interest, for any loss of pay he may have suffered as a result of our discrimination against him.

WE WILL expunge from our files any references to the July 7, 1980, discharge of David Anderson and notify him in writing this has been done, and that evidence of these unlawful actions will not be used as a basis for future disciplinary action against him.

COMMERCIAL TESTING & ENGINEERING CO.

DECISION

DAVID L. EVANS, Administrative Law Judge: This proceeding was heard before me in Ashtabula, Ohio, on June 22, 23, and 24, 1981, pursuant to a complaint issued on October 9, 1980.¹ Said complaint is based on charges filed by United Steelworkers of America, AFL-CIO (herein called the Union). By said charges and complaint, Commercial Testing & Engineering Co. (herein called Respondent) is charged with various violations of Section 8(a)(1) of the Act and a violation of Section 8(a)(3) in the discharge on July 7 of employee David Anderson. Respondent timely filed an answer admitting jurisdiction and the status of certain supervisors, but denying commission of any unfair labor practices. All parties have filed briefs which have been carefully considered.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is an Illinois corporation with facilities located in Ashtabula and Conneaut, Ohio, where it is engaged in the business of sampling coal for chemical analyses. Annually in the course of business, Respondent receives gross revenues in excess of \$50,000 for its services to enterprises located outside the State of Ohio. The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce or in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Alleged Violations of Section 8(a)(1)

Respondent operates facilities at Ashtabula and Conneaut, Ohio, which are coal loading points on Lake Erie. Respondent does not buy or sell coal, but collects for buyers and sellers samples of coal for chemical analyses. Contracts for the delivery of coal are written so that the price varies with the quality of the coal. This quality is determined by systematic sampling of the coal as it is unloaded from railroad cars in Ashtabula and Conneaut. The employees involved herein are called "samplers,"

their primary duty being to operate and monitor the equipment which extracts samples of the coal.

Each shift at Ashtabula and Conneaut is covered by one supervisor and one or two samplers. Additionally, Respondent has an office and laboratory in North Kingsville, Ohio, which is the site of the office of Respondent's branch manager. The branch manager reports to the division manager who is located in Cleveland. The supervisors involved in the case are: Don Meier, division manager; Tom Soini, branch manager; and Elmer Somppi, Neil Falkenburg, and Daniel Sanford, shift supervisors. Soini testified for Respondent; Falkenburg testified for the General Counsel; Meier, Somppi, and Daniel Sanford were not called by any party. Samplers involved in this case are: Anderson, Steve Sanford,² Brad Jarvi, and Albert Pape. Anderson and Sanford were called by the General Counsel; Jarvi and Pape were not called by any party.

On April 21, the Union filed a petition for an election among the samplers of whom there were 11 at the time. An election was conducted by the Board on May 22; the Union won, eight votes to three.³

Dischargee Anderson was the employee who initially contacted the Union and distributed authorization cards to each of the 11 employees in the unit. He also distributed cards to Shift Supervisors Somppi, Daniel Sanford, and Falkenburg. Anderson appeared at a National Labor Relations Board representation hearing on May 13 and was the only union observer at the election. At one point during the campaign, Soini conveyed Respondent's opposition to the organizational attempt directly to Anderson. According to Anderson, he replied that: "I just felt the way things were being run wasn't right and there was favoritism and everything going on. And I just felt the Union would be the best thing for the Company, for us." This testimony was undenied and, indeed, Respondent denied neither knowledge of Anderson's sympathy with the union movement nor knowledge of the extent of his activities on behalf of the Union.

Steve Sanford, who remained in Respondent's employ at the time of the hearing, testified that on the day before the election, at a time when he was working alone, he was approached by Soini. According to Sanford:

THE WITNESS: He came and asked me why I wanted the Union, and I told him for better safety equipment and for conversation between the people and the company. And he told me that he would do everything in his power to get those things for us, that we didn't need a union to—he would supply those for us.

And I asked him about monthly meetings, and he promised me that he would have monthly meetings.

And he asked me who all was in favor of the Union, and I told him all the Ashtabula samplers, myself, Dave Anderson, Albert Pape, Brad Jarvi.

² All references to "Sanford" are to Steve Sanford unless Daniel Sanford is specified.

³ On June 27, Respondent filed objections to conduct affecting the results of the election, but they were overruled and the Union was certified as the collective-bargaining representative of the samplers. Thereafter, the Respondent recognized and began to bargain with the Union.

¹ Unless otherwise specified, all dates herein are in 1980.

He told me, "Just between you and me, that Anderson should have been replaced a long time ago. He is nothing but a pest and a troublemaker."

Soini did not deny asking Sanford why he wanted a union but did deny asking which employees were in favor of union representation. According to Soini, Sanford volunteered names of other employees, but in the context of who would join him in a strike. Aside from the fact that Sanford is a current employee with everything to lose and nothing to gain by false testimony about such remarks,⁴ I found Sanford to be the more candid and impressive witness on this issue and I credit his testimony.

The interrogation of an employee as to the basis of his union sympathy, as well as the identity of other union supporters, is a violation of Section 8(a)(1) of the Act.⁵ Moreover, the questioning of what the employees wanted out of the organizational attempt and the promising to supply them constitutes solicitation of grievances in order to dissuade the employees from choosing the Union as their collective-bargaining representative.⁶ Finally, the labeling of Anderson as a "pest and troublemaker" who should have been replaced long ago was a clear threat to discharge Anderson thereafter. The threat was issued immediately upon Anderson being designated by Sanford as one in sympathy with the Union and under these circumstances it is clear that Anderson's protected union activity was the basis for the threat. Accordingly, I find that, by this statement of Soini to Sanford, Respondent threatened its employees, specifically Anderson, with discharge in violation of Section 8(a)(1) of the Act.

Falkenburg was a supervisor at the time of the election. Falkenburg testified that on the day of the election he was approached in the laboratory by Soini who told him that if the Union were voted in he, Soini, would make things rougher on Anderson. Soini essentially denied this testimony by Falkenburg. According to Soini, he was in the laboratory discussing the election with Falkenburg when Falkenburg stated that Anderson felt that he was being treated unjustly or harshly. According to Soini, he replied "if things—its tough now. Wait until the Union comes in, it would be more rigid rules for policy than we have had." As discussed herein, Falkenburg had been discharged by Respondent by the time of the hearing. It is clear to me that Falkenburg was still bitter over his discharge, but in this testimony on this issue he presented an overall impression of credibility greater than that created by Soini, and I discredit Soini. While the remark was not a violation of Section 8(a)(1) because Falkenburg was then a supervisor, and no employee overheard the remark, this credible testimony by Falkenburg is relevant in assessing the animus possessed by Respondent toward the employees who were in favor of the Union, particularly Anderson.

⁴ *Georgia Rug Mill*, 131 NLRB 1304 (1961).

⁵ *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980).

⁶ *Cutting, Incorporated*, 255 NLRB 534 (1981); see also cases cited therein.

Samplers such as Anderson were not always required to be at Respondent's facilities each hour of the shift for which they were scheduled. They were permitted to telephone the dock company to see if coal for sampling was being dumped during any part of the upcoming shift. If the dispatchers of the dock company replied affirmatively, it was the duty of the sampler to be at his post at the time the dumping was to take place. If the dock company's dispatcher replied negatively, the sampler was not required to be at his post, but he did receive 2 hours' pay for checking in.

At some point during the day of July 5, Shift Supervisor Somppi called Anderson at his home to make sure that he knew the dock company was going to dump coal for sampling and that he should be there. Falkenburg testified that during the morning of July 5 he received a call from Somppi. Somppi related to Falkenburg that he had told Meier that he had alerted Anderson. According to Falkenburg, Somppi stated that Meier had told him: "We don't do things to [sic] people we want to get rid of." Anderson testified that on that night of July 5 he saw Somppi at Respondent's facility. According to Anderson: "Elmer told me that [Meier] chewed [him] out for calling me in the morning and telling me that—he had reminded me to see if I knew they were up or not, because [Meier] says, 'We don't do things like that for people we want to get rid of.'"

B. Discharge of Anderson

1. The events of July 6 and 7

On June 14, Meier conducted a meeting of all samplers. At this meeting Meier told the employees why Respondent was opposed to the organizational attempt and also went into the matter of shift coverage. Anderson and Falkenburg testified on direct examination about Meier's remarks, but also Soini was asked about it on cross-examination and testified:

Q. Was the reporting off procedure discussed at that meeting?

A. Yes.

Q. Did Mr. Meier address that issue?

A. Yes.

Q. What did he say?

A. He said that if a person is calling off sick, he should report that to his supervisor in plenty of time. In other words, you don't call off sick ten minutes before the shift is going to start. Report that to the supervisor and the supervisor will find a replacement.

Q. Did he say anything about any other instances where you would report off other than being sick?

A. He said in order to report off, you have to have a good reason. If you want to get someone to cover your shift for you, you have something else you want to do, but you are not necessarily ill or incapacitated to work, verification or arrangements have to be made.

The main point to some of the other instances is that it has to be reported to the supervisor. If you are not sick, the shift is on your own.

After making these flat statements, Soini testified that Meier was attempting to imply that there was something of a "dual responsibility" between supervisor and employee to find a substitute. However, in accord with the above-quoted admission by Soini, and credible testimony of Falkenburg and Anderson, I find that Meier at that meeting stated that in case of illnesses the supervisor would find a substitute for the sampler.

During the first week in July a friend of Anderson's was injured in a motorcycle accident. Anderson was notified at work on July 4 that the friend had died. When Anderson got home that night he found that the woman with whom he had been cohabiting had left him. According to Anderson he got little sleep that weekend. Calling hours for his friend were during the evening on Sunday, July 6. Anderson was scheduled to be at work at 11 p.m. on July 6, if coal was to be dumped that night. During the afternoon he called the dispatcher at the dock. The dispatcher informed Anderson that dumping was scheduled for that night.

According to the testimony of Anderson and Falkenburg: At 5:30 p.m. on July 6, Anderson called Supervisor Falkenburg and told him that he was having trouble with his nerves and that he would like that night and the few days thereafter off. Falkenburg replied that he could arrange that Anderson be off that night, but Soini would have to be contacted regarding further days off. Falkenburg asked Anderson if he knew anyone who would substitute for Anderson that night. Anderson replied that he thought Sanford would. Sanford had no telephone at the time, but he then lived in an apartment in the same complex as Anderson. Falkenburg told Anderson to go check with Sanford and that he, Falkenburg, would call sampler Brad Jarvi.

Anderson testified that he went to Sanford's apartment but no one answered the door. He returned to his apartment and called Sanford's parents' house, and someone there told Anderson that Sanford was at his girl friend's house. Anderson called that house and contacted Sanford. Sanford told Anderson that he would work that night if no one else could be located to work. Anderson told Sanford that Falkenburg was attempting to locate Jarvi at that time.

While Anderson was talking to Sanford, Falkenburg was attempting to contact Jarvi. According to Falkenburg, the person who answered Jarvi's phone said that he would not be back until about 6:30 p.m. According to Falkenburg and Anderson, Falkenburg then called Anderson and Anderson reported to Falkenburg that Sanford would work if Jarvi would not. According to Falkenburg, he replied: "I would like to hear that from Steve [Sanford] himself." Anderson, however, testified that he asked Falkenburg to call Sanford because: "That was not my job. I didn't want to get involved."⁷ At any rate Anderson gave Falkenburg the telephone number of Sanford's girl friend. Falkenburg testified that the woman who answered that telephone stated that Steve and his girl friend had just left.

⁷ Anderson was not asked what he meant by this remark; it could have been in reference to Meier's statement on June 14 that it was the supervisor's responsibility to get shift replacements when a sampler was ill.

According to Falkenburg, he had wanted to go see a movie that evening, so he called Soini and: "I explained the circumstances to him, said I wanted to go and see a movie, would he mind checking back with Steve later on to make sure he was going to be on duty. Tom said, 'no problem' he would take care of it." On cross-examination, Falkenburg testified that he gave Soini the telephone number of Sanford's girl friend and Soini stated that he had to "go out to the lab that night, he had to make a call from the lab and get ahold of Steve to make sure that he was going to be working."

Soini testified that at 5:45 p.m. Falkenburg called him and related that Anderson "had been having problems with his nerves—this was due to the death of a friend and his girl friend moving out. And he wanted to know if it would be all right if Anderson switched his shift with Steve Sanford or Jarvi." According to Soini, he replied: "Well, under the circumstances, I don't care if they switch, provided the shift is covered." Further according to Soini, Falkenburg replied that he was going to try to contact Jarvi and that Anderson was going to contact Sanford to see if either would work the shift for Anderson.

Further according to Soini, he received another call from Falkenburg about 6 p.m. Falkenburg stated that Anderson had contacted Sanford who had replied that he would work if Jarvi would not, "and Neil wanted to know if I would try to contact Brad Jarvi. And then I talked to Jarvi's mother, and she said he would be home sometime after 6:30." Further according to Soini, he tried to reach Jarvi at 7 and 7:45 p.m., but was unsuccessful. At that point Soini called Anderson.

Further according to Soini:

So I called Dave right after that—7:45—a couple of minutes, and told him that I couldn't reach Jarvi, and to be sure his shift would be covered.

He said Steve Sanford was covering. I asked him again, I said, "Are you sure Steve is covering?" He said, "Yes."

He mentioned at that time he was just leaving for the funeral home to go to the calling hours of his friend. That was the end of that conversation.

Anderson's account of this phone call squarely conflicts with Soini's. According to Anderson, Soini called and asked what was going on and Anderson explained the situation to him about what had happened to his friend and his girl friend. According to Anderson:

He said that, well—he asked me for the number that Steve was at. I gave him the phone number. He said, "I will take care of it, and don't worry about it."

Soini flatly denied telling Anderson that he would "take care of it" and further denied asking for or receiving the number at which Sanford could be reached.

According to Sanford:

I was at my girl friend's house when Dave Anderson called me and asked me if I would work for

him at 11 p.m. I told him to get in touch with Jarvi or somebody else; if they wouldn't work, to get back to me.

And I hung up the phone and I took my girl friend's sister down to the ball park. When I came back, her other sister told me that Neil Falkenburg had called, and that I heard that—

I left my girl friend's and went down to my parents. I waited there until 15 minutes after 11:00. Nobody had called down there. I called out to my girl friend's parents and nobody had called out there.

As noted above, Anderson testified that he told Sanford that Falkenburg was attempting to contact Jarvi. Therefore, Sanford assuredly knew why Falkenburg had called his girl friend's house. But Sanford, according to this record, did not contact either Anderson or Falkenburg to get the message. And no sampler showed up at the Conneaut dock at 11 p.m.⁸

Falkenburg went to the Ashtabula dock at midnight according to his work schedule. At 1:30 a.m., he called the sampler at the Conneaut dock "to see if Steve needed any supplies." There was no answer but Falkenburg did not call again until 2:30. Again there was no answer so he drove the 20 miles to the Conneaut dock arriving about 3:15. There was no one on duty. At that point, according to Falkenburg:

So I called Tom Soini. At that point, I asked Tom why there was nobody down there, and he said, "Well, isn't Steve there?" And I said, "No, he is not."

Soini testified that his response to Falkenburg was a question of why Sanford had not arrived. Soini testified that he told Falkenburg to "get somebody down there."

Rather than calling Anderson's apartment, Falkenburg drove to the apartment house of Anderson and Sanford. He knocked on both doors and got no answer. He went back to the plant and ran the sampler by himself. He called Albert Pape to see if he would come to work the rest of the shift. Albert Pape is married to Anderson's sister. Mrs. Pape answered the phone and told Falkenburg that Albert could not come in that night and that he was not going to be working the next day because Sanford had agreed to substitute for Pape on the shift starting at 7 a.m. (This was according to an agreement between Pape and Sanford which was arrived at at approximately 11:05 p.m. the evening before, according to Sanford.)

About 5 a.m., Mrs. Pape called Anderson and reported that Falkenburg was running the sampler by himself because Sanford had not appeared. According to Anderson, his sister told him that Falkenburg wanted Anderson to go to Sanford's apartment. Anderson then called Falkenburg who reported that Sanford had not appeared. Falkenburg told Anderson to go get Sanford out of bed, which Anderson did. Sanford without question or objection, according to this record, proceeded to the Con-

neaut dock and finished the shift (and covered the 7 a.m. shift for Pape.)

According to Anderson, he called Soini during the morning of July 7, with the intention of asking for additional days off. When he got Soini on the phone:

He said, "Well, its look like you're going to have more than a few days off." I said, "What do you mean?" He said, "You're fired." I said, "Fired for what?" He said, "Abuse of sick time." I said, "What do you mean?" He said, "You weren't too sick to go to the funeral home."

Soini testified that when he arrived at the facility on July 7 he went to where Sanford was working because he wanted to investigate what had happened. According to Soini: "So I asked Steve what had happened, and Steve said that if he had to work that day that Dave Anderson was to contact him and tell him he had to work. And that was pretty much of that conversation."

Soini testified that he called Anderson and got his version of the story. According to Soini:

I asked Dave of his version of the story of what had happened, he said that Steve was to contact Jarvi—pretty much—and I said, "Well, didn't you talk to Steve last night and ask him to work?"

He said, "As far as I knew, Steve was working. If Steve wanted to work, he was to contact Jarvi."

Anderson denied that this conversation took place. He stated unequivocally that there was only one telephone call between himself and Soini that morning, the one in which he was discharged.

Soini also testified on direct examination that at some point during that morning, while Falkenburg was still in the lab, he asked Falkenburg what had happened the night before and why the shift was not covered. According to Soini, Falkenburg replied: "Well, I thought either Jarvi or Sanford—it was my impression that Sanford was covering, that's what Dave told me." Soini then questioned Falkenburg as to why he waited until 3:15 to check to see if anyone was covering the shift and Falkenburg acknowledged that he should have checked earlier. When asked specifically if Falkenburg told him that he had given Anderson the shift off, Soini replied that Falkenburg: "... had given permission contingent upon the fact that someone would cover."

Falkenburg mentioned no contact with Soini on the morning of July 7 either in his direct or cross-examination, nor was he asked about such an exchange when called on rebuttal. He testified that he went home about 3 p.m. that day and got a call from Soini asking him to come back to the lab. At the lab, Soini said that Meier wanted both Anderson and him to be fired and he was going to give Sanford 3 days' suspension "because of the problems the night before."

Falkenburg was fired and Sanford was given the suspension. But the suspension was withdrawn on July 8 when Soini and Meier apparently accepted Sanford's claim that "nobody tried to get ahold of me."

⁸ Soini claimed at the hearing that "over a thousand dollars" in fees was lost to Respondent as a result.

2. Credibility resolutions

Although both Meier and Somppi were named in the complaint, and Anderson and Falkenburg testified on the first day of the 3-day hearing, Respondent called neither supervisor to deny the remaining of the remark by Meier, nor the repetition thereof by Somppi, that Respondent wanted no favors extended Anderson because it wanted to get rid of him. That undenied testimony by Anderson and Falkenburg was credible and the remarks constitute an admission against interest that Respondent, as of July 5, was searching for a reason to discharge Anderson. Since, as I have further found herein, Anderson received no discipline since being given a 3-day suspension in January 1979, the only salient aspect of Anderson's employment tenure in July was his spearheading of the Union's organizational effort. I further find and conclude that the basis of Respondent's desire to discharge Anderson was this protected concerted activity on behalf of the Union. However, this hardly resolves the issue. If Respondent had cause and acted upon it, there is no violation. To determine if Respondent had that cause a number of credibility resolutions must be made.

Falkenburg testified that on the night of July 6 he called Soini and asked him to contact Sanford. Soini testified that Falkenburg called and asked him to contact Jarvi. I credit Soini. Falkenburg acknowledged that he had called Jarvi's house and had been told that Jarvi would return at 6:30 p.m. Falkenburg further knew that Sanford had no telephone. Therefore Falkenburg knew Sanford would be hard, if not impossible, to contact. It is therefore only logical that he asked Soini to try to call Jarvi later, not Sanford. On the other hand, telling Soini how to get in contact with Sanford would be a much more difficult thing to do. He would have to go to the effort of giving Soini the telephone number of Sanford's girl friend. If he had done this, as he testified, he would have mentioned it in his pretrial affidavit. Falkenburg did not. Falkenburg would have mentioned it on his direct examination; he did not. Respondent had posted at its laboratory the telephone number of Sanford's parents. If Soini had told Falkenburg that he was going to call Sanford from the laboratory, rather than Soini's home, as Falkenburg testified, it would be the unusual sort of thing which, if believed, would "clinch" Falkenburg's story and would be in the forefront of Falkenburg's mind and repeated in any subsequent recounting of the event. However, Falkenburg mentioned the reference to the laboratory in neither his affidavit nor his direct examination; he only came out with it on cross-examination. Therefore, I discredit Falkenburg's testimony that he gave Soini the telephone number of Sanford's girl friend or that Soini told Falkenburg that he was going to call Sanford at the girl friend's house, at Sanford's parents' house, or anywhere else. I do, however, credit Falkenburg's testimony that Soini said he would "take care of it." That is precisely what Soini was trying to do when he called Jarvi twice.

Further on cross-examination, Falkenburg for the first time came out with the unequivocal statement that he had, without qualification, excused Anderson from work. However, Falkenburg also stated on cross-examination that he told Anderson that he would like to hear from

Sanford that he would be covering the shift after he had excused Anderson. These are mutually exclusive propositions; the permission not to be at work that night was not unconditional if Falkenburg was simultaneously telling Anderson to have Sanford somehow affirm to him (Falkenburg) that he would work that night.

I further do not believe Anderson's testimony that he gave to Soini the telephone number of Sanford's girl friend. First of all, it is to be noted that Anderson testified that Soini asked⁹ for the telephone number at which Sanford could be reached. Anderson gave three pretrial affidavits, and in none of them did he state that he gave Soini the telephone number of Sanford's girl friend. Had it occurred, it was the unusual and dramatic sort of thing that would lend credence to the story advanced by Anderson. It is further the sort of thing that would be remembered and it is the sort of thing that would have been placed in an affidavit. I believe it was not placed in any of the pretrial affidavits because it did not happen. Accordingly, I find that Anderson did not give Soini the telephone number of Sanford's girl friend.

I do not believe that Soini told Anderson that he would take care of getting the replacement. If he had, Anderson, an intelligent and articulate man, upon being told he was discharged, would have responded something to the effect: "But you said you would take care of it." Further, if such protestation had been made, it would assuredly have been included in Anderson's account of the discharge conversation. It was not. Moreover, Soini had no way to "take care of it." Since, it is undisputed, Jarvi was not at home, and, as I have found, Soini had no telephone number at which Sanford could be reached, it is too unlikely that Soini would have promised something he simply could not have done.¹⁰ Finally, if Soini agreed to call Sanford (as the General Counsel contends) when talking to Falkenburg, there is no logical reason of why he would have called Anderson at all. It is, however, quite logical that he would have called Anderson to secure assurances that Sanford would cover the shift if: (1) he had failed to reach Jarvi; (2) he had been told that Sanford would work if Jarvi would not; and (3) he knew that Sanford and Anderson lived in the same apartment house and Anderson was in a good position to contact Sanford who had no telephone. It is undisputed that all three of these factors were extant, and I find that Soini did not assure Anderson that he would "take care of" contacting Sanford.

I further believe Soini's testimony that he was told by Anderson that Sanford "is covering." While it may have been wishful thinking on his part to think that Sanford would, or could, be contacted (since Sanford was "out of

⁹ It is undisputed that Soini called Anderson after Soini had talked to Falkenburg. Both Anderson and Falkenburg claim they gave the number to Soini. Therefore, if both are to be believed, Soini was asking for a number he already had.

¹⁰ I realize it was not impossible, especially since Respondent clearly wanted to rid itself of union adherent Anderson. However, it is too great a leap to believe that Soini was quick and cunning enough to "set up" Anderson by immediately agreeing to call Sanford while planning not to do it in the hope that Anderson would be caught. Again, if Anderson had suspected such a trap, he would have let it be known in his discharge interview.

pocket" that night according to all of the testimony advanced by the General Counsel), it is clear to me that Anderson said that Sanford would be covering. Both Falkenburg and Soini agreed that, when Falkenburg called Soini at 3 a.m. to report that there was no sampler at the Conneaut dock, Soini's immediate response was to ask where Sanford was. He did not ask where Sanford or Jarvi was; he only asked where Sanford was. That is, Soini believed that Sanford was going to be at the dock that night. He got that impression from Anderson, and he got it by treating Anderson's statement that Sanford "is covering" as complete and final assurance that Sanford would be there.

3. Other asserted reasons for the discharge

Respondent maintains a journal at its facility which it calls its "Daily Log." This log is a notebook in which supervisors note various "goings on" during each shift. The matters recorded include some, but not all, of the usual events that may occur during a shift.

Soini testified that at some point during the morning of July 7 he reviewed the daily log as a part of his investigation and upon that review he and Meier decided to discharge Anderson. Soini was asked on direct examination and testified:

Q. [Why] did you decide to discharge Anderson?

A. Well, once Dave had been given 3 days off prior to this for a similar shift coverage incident. He was tardy quite often . . . in reviewing the records and all that, he was—this incident was more or less the straw that broke the camel's back. A little more than a month ago, he was involved with [sic] an incident with [sic] shift switching.

While there were other matters raised by Respondent as "straws," the principal ones were a prior 3-day suspension, Anderson's attendance record, and the "incident with shift switching" which involved employees Mark Vendetti, Sanford, and Anderson.

As stated in Respondent's brief: "The usual disciplinary progression is verbal warning, written warning, 3-day suspension, and discharge."¹¹ While it is true that Anderson had previously received a suspension, Soini's testimony that it was for a "similar shift coverage incident" was not accurate. In January 1979, Anderson was given his only 3-day suspension. This was for "quick sampling" which is a shortcut method of collecting samples from the railroad cars. Anderson testified about the suspension during direct examination on the first day of the hearing. On the second day of the hearing, in his direct examination, Soini testified that he contacted Supervisor Daniel Sanford the previous evening to check out Anderson's testimony. As Soini acknowledged, Sanford did confirm that the prior suspension (in which Soini had not been involved) was for quick-sampling. Therefore, it was not until the time of the hearing that Soini knew the real reason for the 3-day suspension and his above-quoted testimony reflects an attempt at retro-

actively equating two separate and distinct¹² offenses, quick-sampling and shift-skipping. Therefore, to the extent Soini's testimony was designed to convey the impression that the suspension was prior discipline for the same offense, it simply was not true. Moreover, there can be made no defense that Soini made a good-faith mistake that Anderson had been previously disciplined for a like offense. There was nothing in the daily log which indicated the basis of the suspension, and Soini suggested in his testimony no reason why he was able to contact Daniel Sanford in the middle of a hearing, but was not able to contact him to find the true reason for the prior suspension at the time of Anderson's discharge. Nor can Respondent argue that any prior suspension can serve as the penultimate step in its progressive disciplinary system. Steve Sanford had received not one, but two prior suspensions. As discussed *infra*, Sanford received one suspension in June for shift-skipping. But, also, Sanford testified that during the summer of 1980, before the events of July 6, he received a suspension for being late 3 days in a row. According to Sanford, he had ridden to work those 3 days with employee Bob Webb and they were both suspended for 3 days by Supervisor Daniel Sanford. Soini testified that he had searched Respondent's records and could find nothing indicating that such suspensions were issued, and further testified that no suspensions would have been given without his personal knowledge. Whether it was probably recorded or not, and whether Soini had approved it or not, I found the testimony of Sanford credible. Moreover, had Respondent wanted to rebut the testimony, it could have produced either Webb or, at least, Daniel Sanford to testify that no such event took place. However, assuming that Soini's testimony is true, it still does not detract from the fact that Steve Sanford was afforded the indulgence of at least one suspension for the very same act of failure to cover his shift rather than being discharged the first time he did it; Anderson was fired on the first offense.

Contrary to the argument in its brief, Respondent has not shown that other employees were discharged for missing a shift upon a first offense. Respondent introduced the termination notices of former employees Mark Parker and William Kirkland. Parker was hired on March 10, 1978, and discharged on June 27, 1978. Supervisors directly involved in this termination were not called to testify, and Soini testified that, although he was not involved in that termination, he did know that Parker worked only a few days, hurt his back, and then was off for at least a week if not 2. So, according to Soini "that was the determining factor" in Parker's discharge. Former employee William Kirkland was discharged on December 22, 1978, according to his termination notice, because he "missed 44 cars of [coal] must have went home." This termination notice was signed by Daniel Sanford, who was then Respondent's branch manager (and at the time of the hearing a shift supervisor). Daniel Sanford was not called to testify and Soini was not familiar with the circumstances surrounding Kirkland's discharge. Soini did testify: "If I recall, I

¹¹ Resp. br., p. 8.

¹² Whether 1 car or 100 cars were quick-sampled is not known since Anderson was not asked and Daniel Sanford did not testify.

think he was given 3 days off prior to his termination, but I would not [know] for what." This testimony is incompetent to prove that either Parker or Kirkland was terminated for a first-offense failure to cover his shift. Rather, it shows that Parker was discharged because he worked only 2 weeks out of a 30-day period that he was employed in which he missed a shift, and there is no evidence that there was anything like the confusion involved in Anderson's failure to cover the shift on July 7; that is, apparently Parker just did not show up. If this was Kirkland's first offense of shift-skipping (and Soini's testimony indicates it may well not have been), Daniel Sanford could have been called to testify to such circumstance. Respondent did not call Daniel Sanford or explain its failure to do so and I draw the inference that had he been called his testimony would have been adverse.

The Vendetti—Sanford—Anderson incident, upon which Respondent relies as another "straw," did not involve a shift for which Anderson was scheduled. I shall not recount all the communications made and missed in that incident it suffices to say that about a month before Anderson was discharged Anderson and Sanford wanted to do something during the hours for which Sanford was scheduled to take a shift. Anderson joined Sanford in an attempt to get Vendetti to switch with Sanford. Apparently, Anderson and Sanford thought that Vendetti had agreed to cover the shift, but Vendetti did not show up and the shift was not covered. Sanford was given a 3-day suspension as a result, and no discipline was issued to Vendetti. No discipline was issued to Anderson, although Soini testified that he told Anderson that he had no business acting as a "go-between" for other employees.¹³

Respondent relies heavily on its contention that Anderson had a bad attendance record. The incidents of Anderson's tardiness and absences which were cited by Soini in his testimony may be summarized as follows: In June, Anderson was 15 minutes late to work; however, he was not warned about this incident, if it was unexcused, and Supervisor Falkenburg testified that the tardiness was noted in the daily log for timekeeping purposes, not discipline. On June 23, Anderson went home early because he had a headache; however, there is no intimation by Soini that Anderson was malingering on that date. Soini cited a June 19 entry made in the daily log that Anderson called into the lab to say he was ill but would come in if he felt better. The log, however, indicates that Anderson did, in fact, appear for work on that day. Soini admitted on cross-examination that he "may not have read far enough in the log." On June 8, Anderson took a half day off to move; however, Soini acknowledged that Falkenburg granted Anderson this time off, but argued that Falkenburg should not have done so.

¹³ Respondent argues that Anderson was warned over this incident. In an answer to a conclusionary question on cross-examination, Anderson did admit to having been "warned" about the incident. However, Anderson immediately retracted that answer. Even if he had not, I would not find that Anderson was warned about the incident. Simply telling an employee that he has no business doing something does not, in my opinion, constitute a warning, especially where, as here, the employer has an established disciplinary system of which the first step is a "verbal warning."

On May 29, according to Respondent's log, Anderson was 40 minutes late, then he took too long a lunch period; the supervisor involved in this incident was Elmer Somppi (who did not testify) and Anderson denied that he was, in fact, late. Anderson further testified that during his lunch period no coal was being dumped and, as per his usual practice, he had gone to a nearby grocery store to get something to eat and was never told that he had done anything wrong. Another incident of poor attendance, if that is what it was introduced for, was that in February 1980 Anderson declined to return from layoff when offered a recall. Soini acknowledged that other employees were on layoff and all that was required of Respondent was to call one of those employees in. How this incident demonstrates fault in Anderson as an employee was explained neither by Soini nor Respondent's brief.

In addition to poor attendance, Soini also incorporated in his testimony references in the daily log to such matters as a supervisor (Falkenburg) instructing Anderson and two other employees to keep the equipment clean.

Reliance upon an ordinary supervisory instruction such as to keep equipment clean as "prior discipline" and reliance upon acts or absences which were not made the basis of any warning,¹⁴ were excused, or just did not happen demonstrate to me that Soini did not have very much to complain about in regard to Anderson as an employee.

In fact, on cross-examination, Soini was asked to evaluate Anderson's work performance and replied: "[H]e was a very capable worker when he was there." Indeed, except for the one incident of quick-sampling in January, there is no evidence of any prior criticism of Anderson's work performance "when he was there." In sum, I conclude that Anderson was not, in fact, the inferior employee Soini attempted to depict.

4. Conclusions

On July 8, Sanford gave Meier the story that "nobody tried to get ahold of me" even though he had learned upon return from the ball park that Falkenburg had called his girl friend's house, and, from Anderson's previous call, he knew why. Sanford needed such a story because he had been suspended once before for shift-skipping and would assuredly have been fired if he got caught again. I have the strongest suspicion that Sanford did, in fact, return Falkenburg's call some time that night and that Sanford agreed to cover for Anderson, but for some reason did not do so. This is the only explanation of why Falkenburg would have waited until 1:30 a.m. to check to see if "Steve" (not "Steve or Brad") needed supplies and would have further waited until 3 a.m. to get to the Conneaut facility to find out why the telephone was not being answered. Falkenburg had to have been supremely confident that Sanford was there, and

¹⁴ At various points Soini testified that, because of certain things that happened in Anderson's employment, Anderson should have been warned by the supervisor involved, naming specifically Elmer Somppi. None of these supervisors, including Somppi who was named in the complaint, was called to testify to the fact. Soini's testimony is incompetent to prove that warnings were, in fact, issued.

not just hoping Soini had gotten him (or Jarvi) to agree to report. When Falkenburg found no one at the dock, rather than call Anderson to see who his substitute was, Falkenburg went to the apartment house and tried to rouse Sanford; again, this would only have been because he was absolutely certain that Sanford was supposed to have been at work. (Falkenburg also did not call Jarvi, which obviously would have been easier than driving to the apartment house.) Then, most suspicious of all, when Anderson did get Sanford out of bed at 5 a.m., Sanford went to work without so much as a murmur, even though by that time he had agreed to take Pape's shift starting at 7 a.m. Sanford would not have done this if he had not previously committed himself to substitute for Anderson. This would further explain why Falkenburg told Anderson to tell, not ask, Sanford to get out of bed and come to the dock.

But, even if Sanford had made such a commitment to Falkenburg, there is no reason to believe Anderson knew about it.¹⁵ The real issue in this case is what happened between Soini and Anderson.

What happened on the night of July 6 was a true failure to communicate. Soini did not assure Anderson that he would take responsibility for contacting Sanford. However, he did accept, without more,¹⁶ Anderson's statement that Sanford would be covering. But, when he did so, he knew Anderson's representation was contingent on Sanford's being contacted. Soini was asked on cross-examination and testified:

Q. When you indicated . . . to Anderson that you couldn't get ahold of Jarvi, you asked him whether or not he was sure Sanford would work?

A. I asked him whether or not he was sure the work would be covered.

Q. At the time you asked him that, you knew that Sanford had agreed to work out if Jarvi wasn't willing to work; is that correct?

A. That's correct.

Thus Soini knew that Anderson's representation that Sanford would be covering was not unqualified; it was contingent on Sanford somehow being contacted if Soini gave up trying to find Jarvi. But Soini treated Anderson's representation as unqualified, and left things in that confused¹⁷ state of affairs.

Therefore, Soini knew the incident was the product of confusion¹⁸ toward which he had himself contributed. This is perhaps why, when he fired Anderson, he grabbed at the straw of "abuse of sick time." I find that he did so principally because I found Anderson more credible in relating the statement than Soini in denying

it.¹⁹ Moreover, if, as Respondent argues, Anderson had led Soini to believe he would contact Sanford and then did not do it, Anderson would have been fired immediately for that reason alone without necessity of the exercise of dredging up every conceivable (and inconceivable) incident in Anderson's employment history in a frenetic attempt to convince the Board that Anderson was a nadir employee who should have been fired long before.

It appears that Soini abandoned the "abuse of sick leave" justification upon the realization that it would not withstand scrutiny. Indeed, had he not initially believed Anderson was too sick to work he would have, pursuant to the rule announced by Meier on June 14, told Falkenburg that it was solely the duty of the employee to get the replacement. Soini not only did not tell Falkenburg that, he attempted himself to call Jarvi.

So the defense has moved from the "abuse of sick time" argument to the argument that the missing of the shift, compounded by and with all of Anderson's prior transgressions, is the reason Anderson was fired. The shift in the defense itself demonstrates a pretextual nature of the reasons assigned for the discharge. But the second line of defense will not withstand scrutiny any better than the first.

In relying on the missed shift of July 6-7, Respondent has seized upon a misunderstanding which Soini helped to create. Moreover, as noted above, the discharge of Anderson for his first offense of shift-skipping constitutes disparate treatment *vis-a-vis* Sanford (who was only suspended his first such offense). Finally, the other "derelictions" by Anderson either did not happen, or they were not worthy of so much as a verbal warning pursuant to Respondent's established progressive disciplinary procedure. In sum, the reasons asserted for the defense, jointly or severally, constitute a pretext, and the real reason for the discharge lies elsewhere.

Anderson was the sole solicitor of authorization cards for the Union. Meier had stated, and Somppi had repeated to Falkenburg and Anderson, that Respondent desired to rid itself of Anderson. Soini told Sanford that Anderson was a "pest and troublemaker who should have been replaced a long time ago" when Anderson was identified to Soini by Sanford as being in favor of the Union. And Soini told Falkenburg that, if the Union were successful, things would be made rougher for Anderson.

From these factors, and as I have found, it is clear that Respondent wished to rid itself of Anderson because of his protected activities on behalf of the Union. And, since the reasons advanced for the discharge are clearly pretextual, I find and conclude that, by the discharge of Anderson on July 7, Respondent attempted to do just that.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

¹⁵ It would be illogical to say that Anderson protected Sanford's job while losing his own.

¹⁶ Soini did not ask Anderson who was going to contact Sanford, or how. And Soini did not ask Anderson or Falkenburg to confirm to him when and if Sanford was finally contacted.

¹⁷ At various points in this testimony Soini stated that on the morning of July 7 Anderson said that Sanford was to have contacted Jarvi. This would make sense under no party's version, and it shows that confusion still existed in Soini's mind at time of the hearing.

¹⁸ Indeed, according to the undenied testimony of Sanford, when Meier accepted Sanford's explanation of the incident he summarized: "Well, it must have been a misunderstanding some place . . ."

¹⁹ I further credit Anderson that there was only one telephone call between him and Soini on July 7.

3. By soliciting grievances, making promises of benefits, threatening more arduous working conditions, interrogating employees, and threatening employees with discharge in order to discourage membership in or activities on behalf of the Union, Respondent has violated Section 8(a)(1) of the Act.

4. By discharging employee David Anderson because of his union activities, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to remove the effects thereof and to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged David Anderson, I shall recommend that Respondent be ordered to reinstate him and make him whole for the loss of any earnings he may have suffered as a result of the discrimination against him. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and the entire record in this proceeding, I issue the following recommended:

ORDER²⁰

The Respondent, Commercial Testing & Engineering Co., Ashtabula and Conneaut, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Soliciting grievances, making promises of benefits, threatening more arduous working conditions, interrogat-

ing employees, and threatening employees with discharge in an effort to discourage membership in or activities on behalf of the Union.

(b) Discharging or otherwise discriminating against its employees because they engaged in union or other protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer to David Anderson immediate reinstatement to his former position of employment, or, if such position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of his discharge in the manner set forth in the section of this Decision entitled "Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under terms of this Order.

(c) Post at its places of business in Ashtabula and Conneaut, Ohio, copies of the attached notice marked "Appendix."²¹ Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

²⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

²¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."